COURT OF APPEALS
DECISION
DATED AND FILED

MARCH 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3045-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL L. VOGEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Affirmed.*

ANDERSON, J.[1] Paul L. Vogel challenges the circuit court's refusal to bar consideration of a 1995 drunk-driving conviction from LaCrosse county in its charging and sentencing on the basis that it arose from a constitutionally infirm guilty plea. Vogel contends that his LaCrosse county plea was defective because the circuit court failed to advise him of the penalties for a

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

second offense drunk-driving conviction and failed to establish a factual basis for the plea. As a result, he argues that the Waukesha county circuit court should have ignored the 1995 conviction and treated the current offense as his second and not his third offense. We affirm because a review of the record from the LaCrosse county proceedings persuades us that the plea hearing passes constitutional muster.

Vogel was arrested in the city of New Berlin on August 28, 1997, for operating a motor vehicle while intoxicated (OMVWI) and operating a motor vehicle with a prohibited alcohol concentration (OMVWPAC), third offense. *See* § 346.63(1)(a), (b), STATS. He filed a motion seeking an "order striking from the Complaint the prior conviction for operating while under the influence of intoxicants dated January 18, 1995." Included with his motion was the plea hearing transcript from a 1995 plea hearing conducted in the LaCrosse county circuit court.[2] In his motion and during arguments to the court, Vogel asserted that the prior conviction was based on a constitutionally defective plea and could not be used to enhance the penalties for the pending charge under § 346.65(2), STATS.[3]

[2] Vogel included the criminal complaint and guilty plea questionnaire from the 1995 LaCrosse county conviction in the brief to his appendix. Neither document was submitted to the Waukesha county circuit court. Because these documents are not part of the record, we will not consider them. *See* ***Jenkins v. Sabourin***, 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981).

[3] Section 346.65(2)(c), STATS., 1995-96, provides:

> Any person violating s. 346.63(1): Except as provided in par. (f), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 30 days nor more than one year in the county jail if the total number of suspensions, revocations and convictions counted under s. 343.307(1) equals 3 in a 10-year period, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

We note that 1997 Wis. Act 237, § 527yh removed the phrase "in a 10-year period" from § 346.65(2)(c), STATS.

(continued)

He complained that the plea in the 1995 OMVWI case in LaCrosse county was accepted in violation of § 971.08, STATS. In particular, Vogel asserts that the LaCrosse county circuit court failed to establish a factual basis for the plea and failed to personally advise him of the potential penalties. The Waukesha county circuit court denied his motion. Vogel ultimately pled guilty and was sentenced as a third offender. In this appeal, he raises the same objections he did in the circuit court.

It is undisputed that the sentencing scheme for repeat OMVWI offenses uses prior convictions primarily to enhance punishment. *See* ***State v. Foust***, 214 Wis.2d 568, 574, 570 N.W.2d 905, 908 (Ct. App. 1997). Because the statute is a penalty enhancer, a defendant can attack a prior conviction obtained in violation of constitutional rights if the prior conviction is used to support guilt or enhance punishment for another offense. *See* ***id.*** at 572, 570 N.W.2d at 907.

When collaterally attacking a prior conviction, the defendant has the initial burden of coming forward with evidence to make a prima facie showing that he or she was deprived of a constitutional right at the prior proceeding. *See* ***State v. Baker***, 169 Wis.2d 49, 77, 485 N.W.2d 237, 248 (1992). The question we have to answer is what will constitute a prima facie showing. It is a familiar tenet that a constitutionally effective plea must be "knowingly, voluntarily and intelligently entered." ***State v. Bangert***, 131 Wis.2d 246, 252, 389 N.W.2d 12, 16 (1986). In situations where a defendant seeks to withdraw a plea after sentencing and alleges that the plea was not knowingly, voluntarily and intelligently entered, the defendant must fulfill two threshold requirements:

> First, the defendant must make a showing of a prima facie violation of § 971.08(1)(a), STATS., or other mandatory duties. Second, the defendant must allege that he or she in fact did not know or understand the information which should have been provided at the plea hearing.

State v. Giebel, 198 Wis.2d 207, 216, 541 N.W.2d 815, 818 (Ct. App. 1995) (citation omitted).

We can fathom no reason why the same threshold burden should not also apply when a defendant collaterally attacks a prior OMVWI conviction. First, the collateral attack, like the motion to withdraw a plea after sentencing, only comes after the judgment of conviction is entered and there is an interest in the finality of the plea. *See* ***State v. Krieger***, 163 Wis.2d 241, 249-50, 471 N.W.2d 599, 602 (Ct. App. 1991). Second, in many cases the collateral attack will come years after the plea hearing under attack and it is not unreasonable to require the defendant to establish a prima facie case that he or she was actually prejudiced by the failure of the judge taking the plea to provide correct information.[4] If the defendant makes a prima facie showing, the State must prove that the defendant's plea in the prior proceeding was constitutionally proper. *See* ***Baker***, 169 Wis.2d at 77, 485 N.W.2d at 248.

When there is a collateral attack on a plea, "the voluntariness of a plea should not be tested by determining whether a litany of the formal legal elements was read to the defendant. Instead, a court may consider the totality of

[4] A defendant will not be able to rely upon bare assertions. The facts supporting the collateral attack on the plea must be alleged in the motion or petition. A defendant must do more than merely allege that he or she would have pled differently if a constitutionally proper plea had been taken; such an allegation must be supported by objective factual assertions. Conclusory allegations without factual support will be insufficient; a defendant must provide facts that allow the reviewing court to meaningfully assess his or her claim. *See* ***State v. Bentley***, 201 Wis.2d 303, 313-14, 548 N.W.2d 50, 54-55, (1996).

the circumstances to make such a determination." ***Bangert***, 131 Wis.2d at 258, 389 N.W.2d at 19 (citation omitted). Applying these standards to this case, the issues involve the application of constitutional standards to undisputed facts, which is a question of law this court decides de novo. *See* ***State v. Phillips***, 218 Wis.2d 180, 195, 577 N.W.2d 794, 801 (1998).

Vogel asserts that the colloquy between the LaCrosse county circuit court and himself fails to establish a factual basis for his plea. He challenges the colloquy by arguing that there is no evidence to demonstrate the element of intoxication. Specifically, he complains that there were no results from a blood-alcohol test and that the amount and type of alcohol he had consumed were not part of the record.

Before accepting a guilty plea, the trial court must establish a sufficient factual basis that the defendant committed the crime to which he or she is pleading. *See* § 971.08(1)(b), STATS. For a negotiated guilty plea, a court "need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." ***Broadie v. State***, 68 Wis.2d 420, 423-24, 228 N.W.2d 687, 689 (1975).

We are satisfied that although the plea colloquy is sparse there are inculpatory admissions by Vogel that establish the element of operating a vehicle.

> THE COURT: All right. Now, on December 8th, 1994, at about 10:29 p.m., were you operating a motor vehicle on state trunk Highway 162 near County Trunk Highway J/B in La Crosse County, Wisconsin?
>
> THE WITNESS: No sir. I had put my vehicle -- My vehicle had slid off the ditch during a snowstorm that evening but this was hours before the 10:29 that they had stopped me and questioned me.

….

THE COURT: All right. Then on the evening of December 8th, 1994, had you been operating a motor vehicle on State Trunk Highway 162 near County Trunk J/B?

THE WITNESS: Yes sir.

Vogel's admission is enough to establish that he was operating a vehicle.

During the plea colloquy, Vogel readily admitted that at the time he was operating the vehicle he was under the influence.

THE COURT: And at that time you were operating that motor vehicle while you were under the influence of an intoxicant?

THE DEFENDANT: I believe so, sir.

Contrary to Vogel's argument, it is not necessary to establish that the defendant was operating under the influence by introducing the results of a blood or breath test or determining exactly what type and quantity of alcohol he or she consumed. *See* ***State v. Burkman***, 96 Wis.2d 630, 642, 292 N.W.2d 641, 647 (1980) (evidence of blood-alcohol level not necessary to support a conviction for driving while intoxicated under § 346.63(1)(a), STATS.). Vogel's admission that he was intoxicated when his vehicle went into the ditch is sufficient to establish the second element.[5]

Vogel also argues that the 1995 conviction is constitutionally defective because he was not advised of the potential penalties for a second conviction for OMVWI. A review of the plea hearing transcript establishes that the circuit court never advised him of the penalties. However, our review is not

[5] Later during the colloquy Vogel agreed with the arresting officer's description of him being uncooperative and argumentative when he was asked to submit to a blood test. A defendant's uncooperative attitude is circumstantial evidence of intoxication. *See* ***State v. Babbitt,*** 188 Wis.2d 349, 357, 525 N.W.2d 102, 104 (Ct. App. 1994).

limited to the transcript; we may consider the totality of the circumstances. *See* ***Bangert***, 131 Wis. 2d at 258, 389 N.W.2d at 19.

During the 1995 plea colloquy, the following exchange took place:

THE COURT: Well, all right. I think the Court will give Mr. Vogel the benefit of the doubt. I'm going to impose a fine of $300, $250 driver improvement surcharge, $66 penalty assessment, $30 victim witness "A", $20 victim witness "B", $20 costs, $10 jail assessment for a total of $696.

He'll undergo an alcohol assessment, follow through with the recommendations, participate in the driver safety program, operating privileges revoked for 12 months, ten days in the county jail with work release, first 48 hours without release.

Now, when does he want to report to the jail?

MR. BRINKMAN: Your Honor, *Mr. Vogel advised me first of all because it's a second offense, he's not eligible for his occupational until 60 days from now.*

THE COURT: That's correct.

MR. BRINKMAN: He does a lot of extensive traveling around the country, I believe, and he basically isn't going to be able to do his job until 60 days from now.

He was asking me whether he could start his jail toward the end of the 60 days so that the 10 days is done right at the end of the 60-day period of time so when he's done with the jail he could start working again. Is that correct?

THE DEFENDANT: Yes. Yes, that would be. [Emphasis added.]

It is reasonable to conclude that if Vogel was aware of so arcane a subject as the waiting period before his occupational license would issue after his conviction for a second offense OMVWI conviction, he was also aware of the potential penalties.[6] We are satisfied that Vogel was aware of the potential penalties for second offense OMVWI.

Vogel has also failed to make any objective factual assertions of how the failure to advise him of the potential penalties prejudiced him. He has failed to make any assertion that if he had been advised of the potential penalties he would have entered a plea other than "guilty" or "no contest." He did not file an affidavit in support of his motion and did not testify at the hearing when he collaterally

[6] Section 343.30(1q)(b)3, STATS., 1995-96, provides:

> Except as provided in subd. 4m., if the number of convictions, suspensions and revocations within a 5-year period equals 2, the court shall revoke the person's operating privilege for not less than one year nor more than 18 months. After the first 60 days of the revocation period, the person is eligible for an occupational license under s. 343.10 if he or she has completed the assessment and is complying with the driver safety plan ordered under par. (c).

We note that 1997 Wis. Act 237, § 512u changed the five-year period in § 343.30(1q)(b)3, STATS., to a ten-year period.

attacked the 1995 conviction. Therefore, we conclude that Vogel has failed to make a prima facie showing that the 1995 plea was constitutionally defective.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.